DE 00-009

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC ENERGY CORPORATION, NORTH ATLANTIC ENERGY SERVICE CORPORATION, NORTHEAST UTILITIES AND CONSOLIDATED EDISON, INC.

Joint Petition for Approval of Merger

Order on Motions for Confidential Treatment

O R D E R N O. 23,516

June 23, 2000

In this proceeding, Public Service Company of New Hampshire (PSNH), its affiliates with New Hampshire operations, their parent company Northeast Utilities (NU), and Consolidated Edison, Inc. (CEI) (collectively, the Joint Petitioners) seek approval of the proposed acquisition of NU by CEI. The discovery period in this proceeding has closed and the Joint Petitioners have filed six separate motions seeking Protective Orders providing for confidential treatment of certain information furnished in discovery, pursuant to RSA 91-A:5,IV, Puc 204.05(b) and Puc 204.06. No objections have been filed to any of the Joint Petitioners' motions.

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. *See* RSA 91-A:4, I. The statute contains an exception, invoked here, for "confidential, commercial or financial information." RSA 91-A:5, IV. In

Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540 (1997), the New Hampshire Supreme Court provided a framework for analyzing requests to employ this exception to shield from public disclosure documents that would otherwise be deemed public records. There must be a determination of whether the information is confidential, commercial or financial information "*and* whether disclosure would constitute an invasion of privacy." *Id*. at 552 (emphasis in original, citations omitted). "An expansive construction of these terms must be avoided," lest the exemption "swallow the rule." *Id*. at 552-53 (citations omitted). "Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, . . . since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id*. at 553 (citations omitted).

Our applicable rule is designed to facilitate the employment of this balancing test. We require a motion for confidentiality to contain (1) the specific documents or portions thereof for which confidential treatment is sought, (2) reference to statutory or common law authority favoring

confidentiality, (3) "[f]acts describing the benefits of non-disclosure to the public, including evidence of harm that would result from disclosure to be weighed against the benefits of disclosure to the public," and certain evidence. Puc 204.06(b). The evidence must go to the issue of whether the information "would likely create a competitive disadvantage for the petitioner." *Id*. at (c).

The most important document for which the Joint Petitioners seek confidential treatment is referenced in their first motion. This document is the Joint Petitioners' so-called Synergy Study, which contains their consultant's detailed estimates of the savings to be achieved as a result of the proposed merger. As noted at page 22 of the pre-filed testimony of Mr. Hyman Schoenblum, Consolidated Edison's vice president and controller, the Synergy Study encompasses (1) the categories of projected cost savings, (2) the basis for the quantification of estimated cost savings and (3)an estimate of merger synergies to be achieved. Mr. Schoenblum also noted at pages 22 and 23 of his written testimony that the cost-savings categories discussed in the Synergy Study consist of labor, corporate and administrative programs, non-fuel purchasing economies, and gas supply. The study's bottom-line figure for total synergy savings as a result of

the merger over a ten-year period – $1.3 billion – is publicly disclosed in Mr. Schoenblum's prefiled testimony.

In support of its request for confidential treatment of the Synergy Study, the Joint Petitioners concede that the conclusions contained therein would be of value to the public "but not the detail behind those results." Further, they take the position that the document contains trade secrets within the meaning of Puc 204.06(c)(1)(a) (governing trade secrets "which required significant effort and cost to produce and would take significant effort and cost by others to develop independently") that disclosure of the document would have certain adverse consequences. Specifically, according to the Joint Petitioners,

> The study describes in detail areas of the two companies where consolidation of functions may take place. Disclosure of this information could have a detrimental effect on the morale of the persons who are employed in these areas and may lead to loss of some employees that would otherwise not occur, except for the fact that employees learn that their area is targeted for reductions. The disclosure of areas of the companies where positions may be eliminated may also constitute an invasion of privacy. Puc § 204.06(c)(2).

Joint Petitioners' Motion for Protective Order re Synergy Study at 2.

We do not completely agree with the Joint

Petitioners' rather conservative assessment of the potential value of making this document publicly available. Under the recently enacted Senate Bill 472, RSA 369-B:3 has been amended to include significant merger-related preconditions to the Commission's issuance of a finance order implementing the securitization provisions of the proposed PSNH Restructuring Settlement at issue in Docket No. DE 99-099. Specifically,

> In recognition of the extraordinary benefits provided to PSNH from rate reduction financing, should PSNH or its parent company be acquired or otherwise sold or merged, such merger, acquisition or sale shall be subject to the jurisdiction of the commission under the standard set forth in the original proposed settlement. *The commission may approve such a merger if such approval results in the receipt by PSNH customers of a just and reasonable amount of the cost savings that result from such merger, acquisition or sale.*

RSA 369-B:3, IV(b)(4)(B) (emphasis added). This explicit legislative command could not make more patent the reality that the extent of merger-related savings and the extent to which ratepayers have a claim on such savings is among the most significant public policy issues raised by this docket.

We disagree with the Joint Petitioners' suggestion that the public has an interest only in their overall estimate of savings, as disclosed by Mr. Schoenblum, as opposed to the details and methodologies underlying the $1.3 billion

estimate. If nothing else, those details and methodologies explain the extent to which some portion of the $1.3 billion is properly allocable to the New Hampshire operations of the combined companies. Given the public's interest in having confidence that the process of determining and allocating a just and reasonable share of merger-related savings is conducted fairly and rigorously, we conclude that the public's interest in disclosure of the Synergy Study is significant.

However, we conclude provisionally that this significant interest in public disclosure is outweighed by the interests asserted by the Joint Petitioners in maintaining the confidentiality of the Synergy Study. We note in that regard that no party has contested the Joint Petitioners' motion or otherwise questioned their view that the Synergy Study should not be made public. It may become necessary to revisit our determination as to the Synergy Study at hearing, when we may well conclude that the necessity of developing an adequate record on the issue of merger savings tips the scales in favor of disclosure.

More importantly, it may become necessary to make some or all of the Synergy Study public in order to provide the citizens of New Hampshire with an appropriate level of assurance that we have thoroughly and properly considered the

key issues in this case. *See Society for Protection of N.H. Forests v. Water Supply and Pollution Control Comm'n*, 115 N.H. 192, 194-95 (1975) (discussing value of disclosing "all of the evidence relied upon by the commission in making its final determination"). We note that in orders granting confidential treatment, we routinely retain authority to revisit confidentiality determinations *sua sponte*. In the instance of the Synergy Study, we deem it fair to point out that we will be particularly aware of our responsibility to reopen the confidentiality issue if circumstances warrant.

The Joint Petitioners' second motion for confidential treatment concerns documents prepared for the NU and CEI boards of directors on the subject of the proposed merger. According to the Joint Petitioners, such documents should be kept confidential in order to foster the free exchange of information and views at board meetings. The Joint Petitioners further contend that the documents in question contain trade secrets, including the Joint Petitioners' strategic plans for participation in competitive energy markets. According to the Joint Petitioners, public disclosure of this information would therefore place them at a disadvantage relative to other competitive energy firms. They also point out that, in the event the proposed merger is not

consummated, disclosure of the board presentations could provide an unfair competitive advantage to other potential suitors desiring to acquire some or all of NU. We note the lack of opposition to maintaining the confidentiality of the reports prepared for the Consolidated Edison and Northeast Utilities boards and conclude that the value of their disclosure is outweighed by the companies' interest in maintaining their confidentiality.

However, we deny this motion for confidential treatment to the extent it covers minutes of the board meetings themselves. We do not believe that these boards of directors have a legitimate expectation that their minutes will not be subject to public disclosure, and thus the Joint Petitioners' low level of interest in maintaining their privacy does not outweigh the public's interest in disclosure.

The Joint Petitioners' third motion for confidential treatment concerns NU and CEI's purchased power contracts, the retail peak loads for which NU and CEI are obligated to serve, and the companies' plans for supplying firm loads for the ensuing five years. We defer consideration of this motion as the Joint Petitioners have not filed the documents in question with the Commission and we therefore have not had an opportunity to review them.

The Joint Petitioners' next motion for confidential treatment concerns the business plans prepared by Select Energy and Con Edison Solutions, the Joint Petitioners' competitive energy suppliers. According to the Joint Petitioners, public disclosure of this information would disadvantage their competitive suppliers by making their business strategies available to their competitors. They further contend that the public has little interest in having access to this data given customers' ability to choose among competitive suppliers.

We do not agree with the Joint Petitioners' characterization of the level of public interest in disclosure of these documents, both because the Joint Petitioners implicitly overstate the extent to which competitive markets have developed and because the existence of competition would not necessarily obviate the public's interest in monitoring how such competitors are regulated by the Commission. However, we conclude that the companies' interest in maintaining the confidentiality of these documents outweighs the public's interest in disclosure. As the Joint Petitioners suggest, their position in the competitive marketplace is reasonably likely to suffer harm if the business strategies of their competitive energy suppliers are disclosed to their

competitors.

The Joint Petitioners' fifth motion seeks protective treatment of certain testimony and transcripts that appear in the record of the analogous proceeding before the Connecticut Department of Public Utility Control (DPUC) and were granted confidential treatment by the DPUC. According to the Joint Petitioners, these documents contain discussions of the Synergy Study for which they had previously sought confidential treatment here, and also include information regarding plans for providing severance benefits to certain management personnel in the event the merger is consummated. The Joint Petitioners contend that public disclosure of the severance information would at least potentially invade the privacy of employees who may be involved in the program and would also place the Joint Petitioners at a competitive disadvantage. The Joint Petitioners also suggest that the Commission should defer to the DPUC's previous determination that these materials remain confidential.

In these circumstances, we will grant the request for confidential treatment in part. With regard to the transcripts of hearings held in camera before the DPUC, we will honor that agency's decision to maintain the confidentiality of those information. In our view, it is

normally appropriate to defer to another administrative agency with regard to its decision to maintain the confidentiality of closed hearings unless a party seeking disclosure can demonstrate there is no other potential source of the information and the public disclosure is essential. Further, for the reasons already articulated relative to the Synergy Study, we believe it is appropriate to maintain the confidentiality of testimonial discussion of Synergy Study details at this time. However, we cannot agree with the Joint Petitioners that any valid privacy interest in management severance packages outweighs the public interest in disclosure. Management severance packages are the type of information that is normally disclosed to shareholders and the public and we believe that neither the Joint Petitioners nor any affected employees have a legitimate privacy interest in this data. Accordingly, we will not grant confidential treatment to any portions of the pre-filed written testimony at issue that discuss severance packages.

In their sixth motion, the Joint Petitioners seek confidential treatment of documents furnished to LaCapra Associates, the Staff Advocates in this proceeding, relating to strategic merger plans prepared for their boards and senior management. To the extent that these documents are not

duplicative of those addressed in the Joint Petitioners' second motion, discussed *supra*, we defer consideration of this motion as the Joint Petitioners have not filed the documents with the Commission and we have not had the opportunity to review them.

Finally, the Joint Petitioners request confidential treatment of internal audit reports regarding the Joint Petitioners' customer service functions. According to the Joint Petitioners, such reports could provide competitors with unfair advantages by disclosing to them the companies' self-assessments of any operational weaknesses. The Joint Petitioners also contend that public disclosure of the audits would make future reports less likely to be fully candid and self-critical. We note, however, that several of the reports at issue are significantly out of date and, thus, the Joint Petitioners' privacy interest is somewhat attenuated. We agree that the Joint Petitioners have a legitimate interest in maintaining the privacy of such reports so as to encourage candid internal review, and in light of the lack of opposition to this motion we provisionally conclude that this interest outweighs the benefits of public disclosure.

Based upon the foregoing, it is hereby

ORDERED, that the Motions for Protective Order

and Confidential Treatment of Public Service Company of New Hampshire, North Atlantic Energy Corporation, North Atlantic Energy Service Corporation, Northeast Utilities and Consolidated Edison, Inc., as described above, are GRANTED IN PART AND DENIED IN PART as set forth above; and it is

FURTHER ORDERED, that this Order is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any party or any other member of the public to reconsider this Order in light of RSA 91-A, should circumstances so warrant.

By order of the Public Utilities Commission of New Hampshire this twenty-third day of June, 2000.

Douglas L. Patch Chairman	Susan S. Geiger Commissioner	Nancy Brockway Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary